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SUPERIOR COURT OF PENNSYLVANIA

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MacMILES, LLC d/b/a GRANT STREET TAVERN

Plaintiff-Appellee,

v.

ERIE INSURANCE COMPANY

Defendant-Appellant.

On Appeal from an Order of the Court of Common Pleas of Allegheny County
Docket No. GD-20-007753

BRIEF OF *AMICI CURIAE* UNITED POLICYHOLDERS

James C. Martin (ID No. 204336)
George L. Stewart II (ID No. 56842)
Max Louik (ID No. 311376)
Colin E. Wrabley (ID No. 84414)
Elizabeth L. Taylor (ID No. 327490)
REED SMITH LLP
Reed Smith Center, 225 Fifth Ave.
Pittsburgh, PA 15222
Tel: 412-288-3131
jcmartin@reedsmith.com
gstewart@reedsmith.com
mlouik@reedsmith.com
cwrabley@reedsmith.com

Attorneys for Amicus Curiae United Policyholders

March 16, 2022

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 whose mission is to serve as a trustworthy and useful information resource and an advocate for insurance policyholders in Pennsylvania and throughout the United States. Because UP routinely assists and informs individual and commercial policyholders with regard to every type of insurance product and the insurance claim process generally, the organization has a significant interest in the orderly and balanced development of Pennsylvania's insurance law.

State insurance regulators, public officials and journalists throughout the U.S. routinely seek UP's input on insurance sales, coverage, claim handling and litigation matters. UP's Executive Director, Amy Bach, has served as an official consumer representative to the National Association of Insurance Commissioners since 2009, and is an appointed member of the Federal Advisory Committee on Insurance to the U.S. Treasury and the American Bar Association's Standing Committee on Disaster Preparedness and Response. UP regularly coordinates with the Pennsylvania Department of Insurance on matters impacting state residents and businesses.

UP seeks to assist courts as *amicus curiae* in appellate proceedings throughout the United States, including the Pennsylvania Supreme Court, particularly in cases involving insurance principles that are likely to affect large

segments of the public. Accordingly, UP has appeared as *amicus curiae* in: *Pa. Mfrs.' Ass'n Ins. Co. v. Johnson Matthey, Inc.* (24 MAP 2017); *Rancosky v. Wash. Nat'l Ins. Co.* (28 WAP 2016); *Mut. Benefit Ins. Co. v. Politopoulos* (60 MAP 2014); *Allstate Prop. & Cas. Ins. Co. v. Wolfe* (60 MAP 2014); *Babcock & Wilcox Co. v. Am. Nuclear Insurers* (2 WAP 2014); *ACE Am. Ins. Co. v. Underwriters at Lloyd's & Cos.* (45 EAP 2008); and *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.* (88 MAP 2008). A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in UP's online *Amicus* Project library at www.uphelp.org.

Of special relevance here, UP filed an amicus brief on the coverage issues presented in a related case, *Ungarean v. CNA*, No. 490 WDA 2021 (Pa. Super. Ct.).

Pursuant to Pa. R.A.P. 531(b)(2), no person or entity other than UP, its members, or its counsel authored any part of this brief.

SUMMARY OF ARGUMENT

Insurer *Amici* have taken an unusual step in their brief in this case. Rather than provide a balanced analysis of the issues on the merits, they have decided to attack UP for purportedly misrepresenting or misunderstanding "property damage" insurance in the organization's *amicus* brief filed in a related case.[1] These attacks variously extend to UP's historical analysis of the relevant case law, our discussion of the development of business interruption coverage, and our analysis of COUCH ON INSURANCE 148:46. Aided by a healthy dose of hyperbole, Insurer *Amici* maintain that UP has so perverted the law and the relevant policy provisions that it is effectively calling for the creation of "regulatory loss insurance," covering any economic losses from any limiting or confiscatory government order.

One can fairly question whether this onslaught abdicates the role of an amici as a friend of the court. Given this broadside attack on our credibility, UP feels compelled to redirect this Court to our brief in *Ungarean* and let the Court decide for itself how to credit what UP has to say. For purposes of this brief, however, since the Insurer *Amici* have accused UP of taking leave of our senses, it is pertinent to briefly review the facts and history we previously laid out in. History is indeed being rewritten here but by the insurance industry, not UP. In particular:

[1] Brief of *Amicus Curiae* United Policyholders, filed in *Ungarean v. CNA*, No. 490 WDA 2021 (Pa. Super.) ("UP's *Amicus* Brief in *Ungarean*").

- UP's analysis of 50 years of case law predating the pandemic shows that finding coverage for business interruption losses resulting from a fast-spreading and deadly disease is in keeping with what the insurance industry understood, and intended, its policies to cover;

- UP's recitation of the decades-long construction of business interruption coverage provisions and the insurance industry's accompanying development of a virus exclusion is effectively unrefuted because it reflects what occurred;

- UP's breakdown of the fallacies underlying COUCH ON INSURANCE § 148:46 is documented and the misstatement of the law in that section has been acknowledged – twice – by the author of the excerpt in his more recent writings;

- UP is not suggesting that the absence of the virus exclusion in a policy creates coverage but it correctly asserts that the insurance industry's development of the exclusion in reaction to the case law referenced above is relevant to the construction of the disputed policy language; and

- UP's proposed construction of "loss" or "damage" does not lead to "government regulatory" coverage and the fact pattern here does not lead to that result either. If anything, the efforts by the insurance industry to avoid coverage based on the notion that they would be disadvantaged by having to pay claims are attempts to obtain "government regulatory" non-coverage.

As a result, as it did in *Ungarean*, UP maintains that coverage is warranted here under Pennsylvania law and explains why that result aligns with how courts, drafting organizations and insurance companies understood the standard-form language to apply. Namely, the operative language reasonably covers a policyholder's economic losses when it cannot use its property for its insured business purpose as a result of a fast-spreading and often fatal disease. There is,

moreover, nothing untoward about that conclusion and UP urges this Court to stand with Pennsylvania's insureds and adopt it.

ARGUMENT

I. INSURER AMICI ARE UNABLE TO REBUT THE FACTS SUPPORTING UP'S CRITIQUE OF COUCH ON INSURANCE 148:46, SO THEY INSTEAD IMPUGN UP'S COUNSEL.

Insurer *Amici* direct their most vigorous assault at UP's commentary on COUCH ON INSURANCE 148:46. Yet, in the process, they distort every aspect of that commentary, much as that section distorted the status of the common law when Steven Plitt originally drafted it.

First, Insurer *Amici* note that "some lawyers who specialize in suing insurance companies" authored an article detailing the cascade of errors caused by Mr. Plitt's section,[2] and charge that the identity of those authors somehow renders the facts they detail as partisan and unreliable.[3] But Mr. Plitt's errors are errors, and remain so regardless of who calls them out. More to the point, however, who else do Insurer *Amici* expect to raise Mr. Plitt's errors? Insurance industry counsel who represent those who continue to benefit from them? Or Mr. Plitt, who works at the Cavanagh Law Firm, which states on its home page that "[w]e represent the interests of insurers in all areas of defense and coverage matters and maintain an

[2] Richard P. Lewis, *et al.*, "Couch's 'Physical Alteration' Fallacy: Its Origins and Consequences," 56 Tort Trial & Ins. Practice L.J. 621 (Fall 2021) ("Couch's Fallacy").

[3] Insurer *Amici* Br. at 21.

active relationship with insurers nationwide"?[4] If insurer advocates repeatedly cite an insurer advocate's section as an objective statement of the common law, it can hardly be a shock to their collective conscience if policyholder advocates point out that the section is insurer advocacy, rife with legal and factual errors.

Second, Insurer *Amici* impugn UP's choice to address the source of the error in the 200 decisions parroting Mr. Plitt's conclusion—exposing the lack of foundation for the legal conclusion itself—instead of examining those decisions individually.[5] Insurer *Amici* do not suggest exactly what can be learned from looking at these 200 decisions, which contain little more than a repetition of Mr. Plitt's "catchphrase" and a citation to COUCH (and/or a string cite of cases citing COUCH). If, as Insurer *Amici* suggest, Mr. Plitt is simply "examin[ing] how courts have decided individual cases and suggest[ing] a legal standard that courts might find helpful," is it not likewise "helpful" to re-"examine" how courts had "decided" individual cases in 1995 when Mr. Plitt first "suggest[ed]" his "legal standard"?

Insurer *Amici*'s desire to avoid a more particularized foundational examination is understandable given what it reveals. Prior to Mr. Plitt's creation of his "distinct, demonstrable physical alteration of the property" "legal standard," no

[4] https://www.cavanaghlaw.com/practices/insurance-defense/.

[5] Insurer *Amici* Br. at 21.

court had ever employed it.[6] On the contrary, Mr. Plitt clearly invented it. The one case out of the five he originally cited that provided at least some support for his standard – *Benjamin Franklin* – was a federal trial court decision attempting to predict Oregon law, and it made a bad prediction at that. An Oregon appellate court rejected the trial court's reasoning in a decision two years *before* Mr. Plitt created his "legal standard."[7] (Mr. Plitt did not cite the overruling decision).

Insurer *Amici* try to rehabilitate Mr. Plitt's unfounded 1995 declaration by citing four cases they say supported it at the time. This effort stalls at inception. The first, *Leafland*, is a "trigger of coverage" case, finding that the discovery, in 1988, that asbestos had been used in the construction of a building in 1972-74, did not trigger property coverage because nothing had happened during the 1988-89 policy period.[8] The second, *Fujii*, is also a "trigger" case, with the court holding that when a rainstorm had made the collapse of a house more likely in the future, the absence of a collapse during the policy period meant the policy was not triggered.[9] The third, *Benjamin Franklin*, is the federal court case that erroneously

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[6] Couch's Fallacy, at 626.

[7] *Id.* at 625-26.

[8] *Leafland Group – II, Montgomery Towers Ltd. Partnership v. Ins. Co. of N. Am.*, 881 P.2d 26, 28 (N.M. 1994).

[9] *Fujii v. State Farm Fire & Casualty Co.*, 857 P.2d 1051, 1052 (Wash. App. 1993).

predicted Oregon law.[10] In the fourth, the court simply found that the policyholder had not demonstrated that vehicle safety stabilizers, which fell to the floor, causing them to be unsalable when the manufacturer withdrew the warranty, experienced physical loss or damage, because the stabilizers could not be opened to determine whether they had been damaged.[11] None of these cases support Mr. Plitt's ubiquitous physical alteration declaration, much less his categorical assertion that his physical alteration standard represents a "widely held" view.

Third, Insurer *Amici* argue that the origin of Mr. Plitt's rule is irrelevant now because "hundreds of courts have adopted *Couch*'s proposed standard over several decades."[12] This is misleading, but only in a way that highlights the need to critically reexamine the basis for Mr. Plitt's original declaration. In that regard, prior to COVID-19, Mr. Plitt's physical alteration rule had been adopted by **eight** courts from 2003-2020, as against **forty** finding for policyholders from 1957-2020.[13] That "hundreds" of courts have adopted it since 2020 in this context is exactly why this Court should ask whether those courts have been led astray by insurer advocates citing an insurer advocate providing insurer advocacy while

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[10] *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 793 F. Supp. 259 (D. Or. 1990), which was rejected by *Farmers Insurance Co. v. Trutanich,* 858 P.2d 1332, 1335 (Ore. App. 1993).

[11] *Glens Falls Ins. Co. v. Covert*, 526 S.W.2d 222, 223 (Tex. App. 1975).

[12] Insurer *Amici* Br. at 22.

[13] Couch's Fallacy, at 624-29.

posing as a neutral commentator.[14] Doubling down on an unfounded statement does not give it a patina of correctness. It only compounds the error.

Beyond this, UP notes two points which Insurer *Amici* conspicuously elide. One, on its face, COUCH ON INSURANCE 148:46, admits (in the passive voice) that "[t]he opposite result has been reached":

> The opposite result has been reached, allowing coverage based on physical damage despite the lack of physical alteration of the property, on the theory that the uninhabitability of the property was due to the fact that gasoline vapors from adjacent property had infiltrated and saturated the insured building, and the theory that the threatened physical damage to the insured building from a covered peril essentially triggers the insured's obligation to mitigate the impending loss by undertaking some hardship and expense to safeguard the insured premises.[15]

In support of this conclusion, Mr. Plitt cites two (*First Presbyterian Church* and *Hampton Foods*) of thirteen cases finding coverage as of that date.[16] While Mr. Plitt erroneously implies that this is the minority rule, he at least acknowledges that there are two reasonable readings of the still undefined term "physical loss." As a result, the standard-form trigger of time element coverage is ambiguous as to whether it applies where property cannot be used for its intended business

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[15] 10A COUCH ON INSURANCE §148:46 (2005).

[16] *Id.*

purpose—the very purpose that formed the basis for the insurance bargain in the first place. That ambiguity, in turn, should favor insureds, not the policy's drafters.

Two, Insurer *Amici* fail to disclose that Mr. Plitt has, since 1995, stated unequivocally that his original analysis was off-base and did not reflect a "widely held" majority rule. Specifically, in 2013, Mr. Plitt published an article in an insurance-industry journal contradicting his 1995 formulation in COUCH. The title makes the point plain: *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*.[17] In this article, Mr. Plitt discusses recent case law, concluding that the "modern trend" is that "courts are not looking for physical alteration, but for loss of use."[18]

And, that same year, Mr. Plitt wrote another article asserting particularly that "[w]hen physically damaged property retains a stigma despite remedial efforts, the measurable diminished value resulting from the stigma should be recoverable," because "[i]t is well recognized by courts that physical loss exists without destruction to tangible property" such as "serious impairment of a building's function" which "may render the property useless."[19] On this point, UP would

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[17] Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims Journal (Apr. 15, 2013) ("*The Modern Trend*").

[18] *Id.*

[19] Steven Plitt, *All-Risk Coverage for Stigma Claims Involving Real Property*, Ins. Lit. Rptr., Vol. 35, No. 9 (June 5, 2013) ("*Stigma Claims*").

note that nearly two years after the start of the COVID-19 pandemic, Mr. Plitt co-authored an update to another treatise which concluded, slightly more equivocally but still contrary to what he wrote in COUCH ON INSURANCE 148:46, that "[i]t is difficult to distill a general rule" from the relevant cases.[20] Therefore, on analysis, it is not possible to square the decisions reflexively citing to Mr. Plitt's 1995 "widely held" rule in COUCH ON INSURANCE 148:46, with Mr. Plitt's actual views, expressed in *The Modern Trend* and *Stigma Claims*.

UP's critique of COUCH ON INSURANCE 148:46 is based on facts: the cases which existed – and which did not exist – when Mr. Plitt declared the supposed "widely held" physical alteration rule. Mr. Plitt himself, elsewhere, acknowledges those facts, but has not re-written COUCH ON INSURANCE 148:46 to reflect them. This failure has engendered a cascade of errors in cases considering policyholder claims of loss emanating from the rapid spread of SARS-CoV-2 and COVID-19. This Court should not be the next one taken in by this misdirection.

II. THE CASES CITED BY UP AND MR. PLITT AS REPRESENTING THE MODERN TREND HOLD THAT LOSS OF USE IS SUFFICIENT TO TRIGGER TIME ELEMENT COVERAGE.

As noted in UP's brief in *Ungarean*, insurers have offered no less than ten alternative phrases of limitation that they believe reflect what their policies

[20] John K. DiMugno, Steven Plitt, & Dennis J. Wall, CATASTROPHE CLAIMS: INSURANCE COVERAGE FOR NATURAL AND MAN-MADE DISASTERS § 8.06 (Thomson West, Nov. 2021).

provide. The common denominator in these words of limitation is the phrasing found in COUCH ON INSURANCE 148:46, echoing Mr. Plitt's 1995 "distinct, demonstrable physical alteration of property" coinage. No such limiting language, however, is actually in the policies and this Court, of course, cannot redraft policy language at an insurer's request and the expense of an insured. The bargain enforced is the one that is written, not the one the insurers, in retrospect, wish they had made.

Insurer *Amici*'s response is that the cases UP cites – like *First Presbyterian Church*,[21] *Murray*,[22] *Sentinel Management*,[23] *Trutanich*,[24] and *Matzner*[25] – did, in fact, require altering physical damage. But the reality is revealed in the title of Mr. Plitt's newer work, *The Modern Trend Does Not Require Specific Physical Damage, Alteration*. Consider that:

- In *The Modern Trend*, Mr. Plitt states that in *First Presbyterian Church*, "the court concluded that 'coverage was triggered when authorities orders a building closed after gasoline fumes seeped into a building structure and made its use unsafe," noting that

[21] *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968).

[22] *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998).

[23] *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000).

[24] *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993).

[25] *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998).

"[a]lthough neither the building nor its elements were demonstrably altered, its function was eliminated."[26]

- In *The Modern Trend*, Mr. Plitt states that the court in *Murray* "found that direct physical loss may exist if the property is injured with an absence of structural damage as opposed to destroyed," noting that "[t]he home was not damaged by the rocks" but "firemen who responded to the loss compelled the insured to leave the home because additional rocks could fall."[27]

- In *Stigma Claims*, Mr. Plitt stated the court in *Sentinel Management* found "the presence of asbestos fibers constitutes a physical loss, even though no structural damage existed."[28]

- In *Stigma Claims*, Mr. Plitt stated the court in *Trutanich* concluded "that the odor resulting from a tenant's making crystal methamphetamine constituted physical loss despite the fact that no physical mutilation occurred."[29]

- In *Stigma Claims*, Mr. Plitt stated the court in *Matzner*, the court concluded "that loss of use damages" were covered "because they were caused by carbon-monoxide contamination – a physical loss under the policy."[30]

UP thus stands by the cases it cited which manifestly do not impose a requirement that property be physically altered to trigger time element coverage. As Mr. Plitt

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[26] Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims Journal (Apr. 15, 2013) ("*The Modern Trend*").

[27] *Id.*

[28] Steven Plitt, *All-Risk Coverage for Stigma Claims Involving Real Property*, Ins. Lit. Rptr., Vol. 35, No. 9 (June 5, 2013) ("*Stigma Claims*").

[29] *Id.*

[30] *Id.*

puts it, the "modern trend," drawn from these cases, is that "courts are not looking for physical alteration, but for loss of use."[31]

III. THE INSURANCE INDUSTRY'S DRAFTING OF A STANDARD-FORM EXCLUSION TO APPEND TO STANDARD-FORM BUSINESS INTERRUPTION COVERAGE GRANTS CONFIRMS THAT IT UNDERSTOOD THOSE COVERAGE GRANTS TO COVER LOSS FROM DISEASE-CAUSING AGENTS.

UP does not argue, as Insurer *Amici* claim that the absence of a virus exclusion in an insurance company's policy serves to create coverage.[32] Rather, UP points to the absence of such an exclusion as aiding in the construction of the language that is in the particular policy—the exact issue facing this Court.

For that relevant purpose, it is worth beginning at the beginning. Property insurance policies are unusual contracts. Overwhelmingly, any particular property insurance policy is not a bespoke contract, containing language mutually drafted and agreed by a single policyholder and a single insurance company to address a single exposure. Rather, property insurance policies routinely employ standard-form language, drafted years and even decades ago, not by insurance companies – and certainly not by policyholders – but by insurance industry drafting organizations. Standard-form language benefits insurance companies – which by law are allowed to pool loss data to help them set premium rates – and also assists

[31] *Id.*

[32] Insurer *Amici* Br., at 23-24.

policyholders, who can simply compare price from company-to-company rather than being forced to flyspeck language from hundred-page policy to hundred-page policy.

With this as background, the point in UP's Amicus Brief in *Ungarean* was not that the absence of an exclusion in a particular policy meant that it must cover an otherwise excluded exposure. Rather, UP made the following, broader observations:

- The standard-form trigger in property insurance has been remarkably stable since ISO changed it, in the mid-1980s, from "damage" or "destruction" of property to "physical loss of or damage to property."
- It is the responsibility of insurance industry drafting organizations like ISO to monitor how courts apply their standard-form language, and they admit that they do so.
- Insurance industry drafting organizations therefore knew that, from 1957 forward, courts considering language similar to that which ISO drafted in mid-1980s had found that disease-causing agents – ammonia, bacteria, fumes, carbon monoxide, asbestos, poisonous spiders – cause "physical" "loss" or "damage" to property, despite the fact these agents do not "alter" property and instead only potentially cause injury to humans.
- As a result – and as they admitted – insurance industry drafting organizations drafted the Exclusion for Loss Due to Virus or Bacteria in 2006 to bar all loss or damage from a virus, acknowledging to regulators that, under existing law, a virus could cause physical loss or damage and thus could trigger a covered business interruption loss.

Insurer *Amici* do not contest any of this – which is a matter of the indisputable regulatory record – and UP submits that this evidence is relevant to the intent of the contracting parties, a core principle of contract construction.

Beyond this, as noted in one of the most important insurance coverage cases in the United States, when insurance companies fail to use clear and distinct language to exclude a cause of loss known in the market, they "act at their own peril."[33] Pennsylvania courts embrace this admonishment as well.[34] Here, Erie understood what its policy covered, the market understood what Erie's policy covered, and if Erie had a contrary intent when it came to claims arising from a virus, it was incumbent upon Erie to insert an exclusion into its policy. It did not.

IV. THE PROPER CONSTRUCTION OF THE POLICY KEEPS ECONOMIC LOSSES WITHIN REASONABLE LIMITS.

Insurer *Amici* claim that not requiring physical alteration to trigger business interruption coverage would lead to absurd results, providing for blanket coverage for economic losses with no discernable limit. This is just more misdirection.

First, in their cacophony, Erie and its Insurer *Amici* give no credit to the precipitating event: a once-in-a-century pandemic which rendered MacMiles's premises unusable for its insured business purpose. There is nothing radical in

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[33] *Pan Am. World Airways, Inc. v. Aetna Cas. & Surety Co*., 505 F.2d 989, 1001 (2d Cir. 1974).

[34] *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 903 A.2d 1170, 1177 (Pa. 2006) (noting that insurer "was free to define" the policy term consistent with its interpretation, but "did not do so").

confirming business interruption coverage arising from the omnipresence of disease-causing agents. Courts have found loss of use following from disease-causing agents to trigger business interruption coverage for more than 50 years. Here, extending coverage aligns this case fully with affording coverage for economic losses arising from ammonia, smoke, bacteria, asbestos, radon, mold, and spiders, where no physical alteration occurred.

Second, MacMiles is not seeking coverage for something like a zoning change or a regulation that would reduce occupancy rates or hours of operation. It is seeking coverage because its business was shut down by a fortuitous external peril—that is, a rapidly-spreading disease that has now claimed a million lives in the US. There is no reason to project that future coverage cases will extend the analysis any more broadly than that and if there is absurdity to be found it is in Insurer *Amici*'s and Erie's efforts in making the extension.

Third, Erie and its Insurer *Amici* seemingly forget that business interruption coverage is an add on, purchased for an enhanced premium and specifically provided for the business that is being insured. It likewise provides coverage for purely economic losses—the very result that the insurers now describe as absurd. Here again, the absurdity lies in the efforts to remake the bargain struck and deprive the insureds of the benefits they paid for.

V. MISPLACED CONCERN FOR THE INSURANCE INDUSTRY IS ERRONEOUSLY AFFECTING HOW COURTS RULE IN CASES INVOLVING SARS-COV-2 AND COVID-19.

Building on their self-created parade of horribles, the Insurer Amici persist in arguing that abandoning the physical alteration standard will be catastrophic for the industry. This fear of catastrophe, as hypothesized, does not invoke a policy construction principle at all, yet it has led many federal courts to abandon their role under *Erie* to defer to what state policy construction principles provide. This Court should not follow that path.

First, policyholders in cases like this one are faring far better in state courts, the ultimate arbiters of state law, than they are in federal courts, which are clearly doing a poor job of predicting state law. This is a glaring problem of federalism, about which commentators are beginning to take notice:

> Insurers tout the box score in support of their arguments to nullify business interruption coverage for COVID-19 losses. The box score argument is simplistic and obscures the truth, because it is based on federal courts committing either the Erie error or the Twombly-Iqbal error — and, in some cases, both — in many of those decisions. Federal courts sitting in diversity must adhere to the law and defer to the judgment of state courts, the true arbiters of the law on insurance, and to juries, the arbiters of factual disputes.[35]

For example, Insurer *Amici* cite the Sixth Circuit's holding in *Santo's Italian Café LLC v. Acuity Insurance. Co.*, in which the court applied Ohio law and relied

[35] Lorelie Masters, *et al.*, "Federal Courts Make Two Basic Errors in Virus Coverage Rulings," Law360 (Sept. 30, 2021).

on COUCH ON INSURANCE 148:46 in finding that "direct physical loss or direct physical damage" is a touchstone of coverage for most commercial property policies and also that "traditional uses of commercial property insurance support this interpretation."[36] But that is fiction. As discussed in UP's *Amicus* Brief in *Ungarean*, courts instead historically have confirmed, repeatedly, that the traditional use of property insurance is to provide coverage in situations in which external perils rendered the use of property impossible, regardless of whether such property had suffered physical "alteration." And when Judge Ward analyzed the actual policy language and applied Pennsylvania law, she found that it was reasonable to interpret the phrase "direct physical loss of . . . property" to encompass the loss of use of MacMiles' property due to the spread of a disease absent any actual alteration to property.[37]

Second, and equally as troubling, most of the decisions rejecting policyholder claims for "loss" or "damage" to property from SARS-CoV-2 or COVID-19 are in response to insurance company motions to dismiss. Indeed, in the analogous pre-2020 cases discussed by UP, the courts reached their decisions after a full trial,[38] after a decision on a motion for summary judgement at a trial on

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[36] 15 F.4th 398, 403 (6th Cir. 2021).

[37] *MacMiles, LLC v. Erie Ins. Exch*., No. GD-20-7753, at 17 (Pa. Cm. Pl. May 25, 2021).

[38] *See Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957); *Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400 VRW, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002); *Shade Foods*, *Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865

damages,[39] or on motions for summary judgment.[40] Only one was rendered on a motion to dismiss.[41] Thus, not only are federal courts usurping state law and ignoring decades of contrary decisions, they are doing so on preliminary motions,

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(2000); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992).

[39] *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993).

[40] *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017); *Gregory Packaging, Inc. v. Travelers Prop. & Cas. Co. of Am.*, Civ. No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 (D.N.J. 2014); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. Apr. 9, 2013); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009); *Brand Mgt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002); *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. App. 1995); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *9-10 (Ind. Super. Ct. Nov. 30, 2007); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996); *Sentinel Mgt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 544-45 (App. Div. 2009); *Customized Distrib. Servs. v. Zurich Ins. Co.*, 373 N.J. Super. 480, 493 (App. Div. 2004); *Schlamm Stone & Dolan LLP. v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. App. 2002); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998). In one case, the procedural posture upon which the decision was reached is unclear. *See Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C. 4th 271, at *3 (Pa. Com. Pl. May 28, 1992) (making factual findings).

[41] *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010).

when there is no factual development and policyholder allegations supporting coverage should be taken as true.

Third, when one steps outside of the industry orchestrated cacophony surrounding SARS-CoV-2 and COVID-19, courts continue to apply the analysis supporting coverage without physical alteration being required. For instance, in *Crisco v. Foremost Insurance Co.*, the policyholders owned mobile homes at a park where a fire destroyed most of the park but did not damage the policyholder's mobile homes.[42] Specifically, the fire destroyed the electric, gas, sewer, and potable water infrastructure which serviced the policyholders' mobile homes.[43] After, various civil authorities prohibited living in the mobile homes, the policyholders sought coverage for the "total loss" of their mobile homes, and the issue was whether they had shown "direct, sudden and accidental physical loss" to their property.[44] As in this case, the insurer, citing the putative standard in COUCH ON INSURANCE 148:46, argued that the policyholder had not shown "distinct, demonstrable physical alteration" to their mobile homes, noting that the property which was destroyed was owned by the park owner not the policyholders.[45] The court rejected this argument:

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[42] No. C 19-07320 WHA, 2020 WL 7122476 (N.D. Cal. Dec. 4, 2020) (applying California law).

[43] *Id.* at *1.

[44] *Id.* at *2 - *3.

[45] *Id.* at *4.

> Our [policyholders] do not seek to recover repair costs, loss of income, or even damages for their loss of use while they could not reside in their homes. Rather, [the policyholders] seek to recover for the loss of their insured dwellings. As discussed, the fire caused a "distinct, demonstrable, physical alteration" to the insured dwellings. MRI Healthcare, 187 Cal. App. 4th at 779. While the infrastructure belonged to the park, it physically interconnected with the units it serviced. The fire destroyed that infrastructure, such that the sewage, electricity, water, and gas did not physically run, as it previously had, in the unit itself. [The policyholders'] homes were destroyed just as suddenly, just as directly, and just as accidentally as those immediately burned by the fire, for the fire destroyed the viability of the entire park.[46]

Citing *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. App. 1962), the court concluded that when the fire destroyed the utilities infrastructure, "the sewage, electricity, water, and gas did not physically run, as it previously had" in the mobile homes, and that deprivation "constitutes an insured physical loss under the policy."[47]

Similarly, in *James W. Fowler Co. v. QBE Insurance Corp.*, at issue was coverage for a "micro-tunnel boring machine" ("MTBM"), which was being used to bore a tunnel deep underground when it became immobilized, with no potentially cost-effective way to recover it, although it had not been physically damaged in any way.[48] The policyholder sought to recover the cost of the MTBM

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[46] *Id.* at *5.

[47] *Id.*

[48] No. 3:18-cv-1705-S1, 2020 WL 4291272, at *2 (D. Or. July 24, 2020) (applying Oregon law).

under a policy providing coverage for "direct physical loss caused by a covered peril."[49] In resolving the coverage dispute, the court noted that "[t]he primary legal question before the Court is whether the burial deep underground of covered property that remains intact and undamaged constitutes a 'direct physical loss.'"[50] The insurer argued that "direct physical loss" required "physical damage."[51] The policyholder's argument was primarily based on definitions of "direct" ("proximate" as opposed to "remote"), "physical" ("meant to exclude intangible loss, such as depreciation of value"), and "loss" ("the state or act of being destroyed or placed beyond recovery").[52]

Again, the court found coverage, even when faced with the restrictive (and erroneous) standard reflected in COUCH ON INSURANCE 148:46:

> But [the policyholder's] alleged loss is not intangible or incorporeal, nor a mere detrimental economic effect. [The policyholder] alleges that the MTBM is permanently buried underground. [The policyholder's] alleged loss is much more analogous to the loss in Western Fire, where the church structure remained intact and undamaged, but was rendered uninhabitable by gasoline contamination. The MTBM, while intact and undamaged, is rendered useless to [the policyholder] if it is stuck underground.[53]

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[49] *Id.* at *3.

[50] *Id.*

[51] *Id.* at *4.

[52] *Id.*

[53] *Id.* at *6.

As here, no structural alteration was required; what was required was that the policyholder lost the ability to use its property for its intended business purpose.

Additionally, in *National Ink & Stitch, LLC v. State Auto Property & Casualty Insurance Co.*, the policyholder suffered a ransomware attack on its computer server, permanently losing access to its art files and other data, and its computers were permanently slower.[54] At issue was whether either of these effects constituted "direct physical loss of or damage to" property.[55] The insurer argued "that because [the policyholder] only lost data, an intangible asset, and could still use its computer system to operate its business, it did not experience 'direct physical loss' as covered by the Policy."[56] The court specifically rejected the insurer's argument that the policyholder did not suffer "direct physical loss of or damage to" its computer system because the policyholder could still use it to operate its business.[57] Citing cases holding that loss of functionality constitutes "physical loss or damage," the court found that the computer system had suffered "physical loss or damage":

> In the instant case, [the insurance company] seems to equate "physical loss or damage" to [the policyholder's] computer system to require an utter inability to function. The Policy language, and the relevant case law, impose no such prerequisite. The more persuasive cases are those

[54] No. SAG-18-2138, 2020 WL 374460, at *1 (D. Md. Jan. 23, 2020).

[55] *Id.* at *2.

[56] *Id.*

[57] *Id.*

> suggesting that loss of use, loss of reliability, or impaired functionality demonstrate the required damage to a computer system, consistent with the "physical loss or damage to" language in the Policy (emphasis added). Indeed, in many instances, a computer will suffer "damage" without becoming completely inoperable. Here, not only did [the policyholder] sustain a loss of its data and software, but [the policyholder] is left with a slower system, which appears to be harboring a dormant virus, and is unable to access a significant portion of software and stored data. Because the plain language of the Policy provides coverage for such losses and damage, summary judgment will be granted in favor of [the policyholder's] interpretation of the Policy terms.[58]

In short, an event that impairs operations but does not cause a total cessation of operations can cause physical loss or damage.

Further, in *EMOI Services, LLC v. Owners Insurance Co.*, the policyholder, which provided medical billing services and support to medical providers, was a victim of a computer hacking attack, which prevented it from accessing individual files until it paid a ransom.[59] After determining that it would cost more to decrypt its files without paying the ransom, the policyholder paid the ransom, and the hacker provided a link to a program to decrypt the files, and the policyholder decrypted the files.[60] Thereafter, the encryption program ran again, but the policyholder successfully re-ran the decryption program.[61] In a coverage action,

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[58] *Id.* at *5.

[59] No. 29128, 2021 Ohio App. LEXIS 3849, at *2-3 (Ohio App. Nov. 5, 2021) (applying Ohio law).

[60] *Id.* at *2.

[61] *Id.* at *3.

the insurer moved for summary judgment, arguing that "no direct physical loss or damage had occurred."[62] The trial court, in a decision clearly impacted by opinions on claims for coverage for loss or damage from SARS-CoV-2, granted summary judgment, concluding "[a]ssuming arguendo that the software was 'damaged' while it was encrypted, given the fact that [the policyholder] has all the data it did before the ransomware attack, and that its software is now fully functional, the Court finds that the 'media' is no longer damaged."[63]

The appellate court reversed, rejecting the insurance company's arguments that the policyholder did not suffer "direct physical loss of or damage to" its software. First, the court rejected the insurer's argument – based upon cases addressing coverage for loss from SARS-CoV-2 and COUCH ON INSURANCE 148:46 – that "'physical loss or damage' [sic] does not occur when the insured merely loses access or use," concluding that:

> [The policyholder's witness's] description of the "damage" caused by the encryption went beyond aesthetic [i.e., the mold damage in Mastellone]. [The policyholder's witness] stated in his deposition that all of the files had "weird extensions" that prevented access to the files. When he tried to open the encrypted files, a ransom note appeared. As a result of the encryption, [the policyholder] and its clients were unable to access [the policyholder's] system for a significant period of time.[64]

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[62] *Id.* at *7.

[63] *Id.* at *9.

[64] *Id.* at *24-25.

Next, the court rejected the argument, based upon COVID-19 decisions and *Mama Jo's, Inc. v. Sparta Insurance Co.*[65], that "physical loss or damage does not occur when the item can be restored by cleaning."[66] Rather, the loss of access still triggered the coverage.

In short, as they have for decades, courts continue to find that events which render the insured property unfit for its intended use supports coverage under a reasonable construction of "physical loss of" without any physical alteration of the property. This Court should take the same dispassionate approach followed in these cases and pin its analysis on policy construction principles, just as it would in any other context. Pennsylvania insureds who have paid their premiums and sustained their losses deserve that much in this instance as they would in any other. By the same token, hypothetical concerns about the consequences for Pennsylvania insurers should not influence decisions on the meaning of insurance policy language here, just as they would not in any other case either.[67]

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[65] 823 Fed. Appx. 868 (11th Cir. 2020).

[66] *EMOI Services, LLC*, 2021 Ohio App. LEXIS 3849, at *23.

[67] As shown in UP's brief in *Ungarean*, the industry refrain is largely a phantom concern. Only a relatively limited number of policyholders filed legal actions challenging their Business Interruption claim denials as most were deterred (rightly or wrongly) by the fact that their policies contain express virus exclusions. Further, all policies contain certain time and payout limits on business interruption coverage and insurers have been assiduously increasing premiums since the pandemic and now have historical levels of surplus.

CONCLUSION

UP respectfully urges this Court to affirm the order of the Court of Common Pleas.

Dated: March 16, 2022

/s/ James C. Martin
James C. Martin (ID No. 204336)
George L. Stewart (ID No. 56842)
Max J. Louik (ID No. 311376)
Colin E. Wrabley (ID No. 84414)
Elizabeth L. Taylor (ID No. 327490)
REED SMITH LLP
Reed Smith Center, 225 Fifth Ave.
Pittsburgh, PA 15222
Tel: 412-288-3131
jcmartin@reedsmith.com
gsteward@reedsmith.com
mlouik@reedsmith.com
cwrabley@reedsmith.com
etaylor@reedsmith.com

Attorneys for Amicus Curiae United Policyholders

PA. R. APP. P. 127 CERTIFICATION

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ James C. Martin
James C. Martin

CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 2135(d), I hereby certify that this brief complies with the word limit of Pa. R. App. P. 531(b)(3) because it contains 6,838 words, excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

/s/ James C. Martin
James C. Martin

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I hereby certify that on this date, a true and correct copy of the foregoing *Brief of Amici Curiae* was filed using PACFile and that a notice of such filing will be sent in compliance with Pa. R.A.P. 121 on all counsel of record via PACFile.

Dated: March 16, 2022 */s/ James C. Martin*

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IN THE SUPERIOR COURT OF PENNSYLVANIA

MacMiles, LLC d/b/a Grant Street Tavern	:	1100 WDA 2021
v.	:	
Erie Insurance Exchange	:	
Appellant		

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Service

Served:	Chair John P. Goodrich
Service Method:	eService
Email:	jack@goodrichpc.com
Service Date:	3/16/2022
Address:	429 4th Ave. Ste. 900 Pittsburgh, PA 15219
Phone:	412--26-1-4663
Representing:	Appellee MacMiles, LLC dba Grant Street Tavern

Served:	Frederick P. Santarelli
Service Method:	eService
Email:	fpsantarelli@elliottgreenleaf.com
Service Date:	3/16/2022
Address:	925 Harvest Dr Suite 300 Blue Bell, PA 19422
Phone:	215--97-7-1000
Representing:	Appellant Erie Insurance Exchange

Served:	James C. Haggerty
Service Method:	eService
Email:	jhaggerty@hgsklawyers.com
Service Date:	3/16/2022
Address:	1801 Market Street 11th Floor Philadelphia, PA 19103
Phone:	267-350-6609
Representing:	Appellee MacMiles, LLC dba Grant Street Tavern

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PROOF OF SERVICE

(Continued)

Served:	Jason Harlow Peck
Service Method:	eService
Email:	jpeck@dgmblaw.com
Service Date:	3/16/2022
Address:	2927 Chartiers Avenue Pittsburgh, PA 15204
Phone:	484--35-6-4340
Representing:	Appellant Erie Insurance Exchange

Served:	John Elliott Sindoni
Service Method:	eService
Email:	jsindoni@bonizack.com
Service Date:	3/16/2022
Address:	15 St. Asaphs Road Bala Cynwyd, PA 19004
Phone:	610--82-2-0202
Representing:	Appellee MacMiles, LLC dba Grant Street Tavern

Served:	John Ryan Neugebauer
Service Method:	eService
Email:	jrn@elliottgreenleaf.com
Service Date:	3/16/2022
Address:	1411 Knightsbridge Drive Blue Bell, PA 19422
Phone:	215-977-1056
Representing:	Appellant Erie Insurance Exchange

Served:	Joshua D. Snyder
Service Method:	eService
Email:	jsnyder@bonizack.com
Service Date:	3/16/2022
Address:	Boni, Zack & Snyder LLC 15 Saint Asaphs Rd Bala Cynwyd, PA 19004
Phone:	610-822-0203
Representing:	Appellee MacMiles, LLC dba Grant Street Tavern

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Lauren Renee Nichols
Service Method:	eService
Email:	lauren@goodrichpc.com
Service Date:	3/16/2022
Address:	429 4th Ave, Ste 900 Pittsburgh, PA 15219
Phone:	412--26-1-4663
Representing:	Appellee MacMiles, LLC dba Grant Street Tavern

Served:	Matthew Brandon Malamud
Service Method:	eService
Email:	mmalamud@hkr.law
Service Date:	3/16/2022
Address:	610 W Germantown Pike Suite 350 Plymouth Meeting, PA 19462
Phone:	484-243-6878
Representing:	Appellant Erie Insurance Exchange

Served:	Michael J. Boni
Service Method:	eService
Email:	mboni@bonizack.com
Service Date:	3/16/2022
Address:	15 Saint Asaphs Road Bala Cynwyd, PA 19004
Phone:	610--82-2-0201
Representing:	Appellee MacMiles, LLC dba Grant Street Tavern

Served:	Richard W. DiBella
Service Method:	eService
Email:	rdibella@dgmblaw.com
Service Date:	3/16/2022
Address:	40 Woodland Drive Pittsburgh, PA 15228
Phone:	412--34-4-3787
Representing:	Appellant Erie Insurance Exchange

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Scott B. Cooper
Service Method:	eService
Email:	scooper@schmidtkramer.com
Service Date:	3/16/2022
Address:	209 State Street Harrisburg, PA 17101
Phone:	717--23-2-6300
Representing:	Appellee MacMiles, LLC dba Grant Street Tavern

Served:	Tara L. Maczuzak
Service Method:	eService
Email:	tmaczuzak@d-wlaw.com
Service Date:	3/16/2022
Address:	429 Fourth Avenue Suite 200 Pittsburgh, PA 15219
Phone:	412-261-2900
Representing:	Appellant Erie Insurance Exchange

Served:	William A. Pietragallo
Service Method:	eService
Email:	wp@pietragallo.com
Service Date:	3/16/2022
Address:	38th Fl, One Oxford Centre 301 Grant Street Pittsburgh, PA 15219
Phone:	412--26-3-1818
Representing:	Appellant Erie Insurance Exchange

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served:	John Norig Ellison
Service Method:	eService
Email:	jellison@reedsmith.com
Service Date:	3/16/2022
Address:	420 Hidden River Road Penn Valley, PA 19072
Phone:	215--24-1-1210
Representing:	Amicus Allegheny Health Network Amicus Boscov's Department Store, LLC Amicus Eat'n Park Hospitality Group, Inc. Amicus Penn National Gaming, Inc. Amicus Ridley Park Fitness, LLC Amicus Shaner Group Amicus The Mattress Factory

Served:	Mark Alan Aronchick
Service Method:	eService
Email:	maronchick@hangley.com
Service Date:	3/16/2022
Address:	One Logan Square 27th Floor Philadelphia, PA 19103
Phone:	215--49-6-7002
Representing:	Amicus American Property Casualty Insurance Association Amicus Insurance Federation of Pennsylvania Amicus Pennsylvania Association of Mutual Insurance Companies Amicus Philadelphia Indemnity Insurance Company

Served:	Matthew Aaron Hamermesh
Service Method:	eService
Email:	mhamermesh@hangley.com
Service Date:	3/16/2022
Address:	Hangley Aronchick Segal Pudlin & Schiller One Logan Square, 27th Floor Philadelphia, PA 19103
Phone:	215- 49-6 7054
Representing:	Amicus American Property Casualty Insurance Association Amicus Insurance Federation of Pennsylvania Amicus Pennsylvania Association of Mutual Insurance Companies Amicus Philadelphia Indemnity Insurance Company

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

/s/ James Christopher Martin

(Signature of Person Serving)

Person Serving:	Martin, James Christopher
Attorney Registration No:	204336
Law Firm:	Reed Smith, LLP
Address:	Reed Smith Llp 225 Fifth Ave Ste 1200 Pittsburgh, PA 152222716
Representing:	Amicus United Policyholders